COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING

[CHAPTER VIII, RELE 32(2)(B)]

Description of the case.

Criminal Appeal No. 788 of 2001 decided on 6th June 2005.

Akhlaque Ahmad
Vs

State of Uttaranchal.

A.F.R. (Approved for reporting)
~~Not Approved for reporting.~~

(Hon'ble Mr. Justice Irshad Hussain)

(Hon'ble Mr. Justice Rajesh Tandon)

Date: 06-06-2005

In the High Court of Uttaranchal, at Nainital.

Criminal Appeal No. 788 of 2001
(Old No. 2355 of 1991)

Akhlaque Ahmad S/o Raseed Ahmad
R/o Qurater-D-181, Bairaj Colony,
Rishikesh, District Dehradun ….Appellant.

Vs.

State of Uttaranchal ….Respondent.

Sri Dharam Veer Sharma, Senior Advocate assisted
By Sri B.S. Parihar, learned counsel for the appellant.

Sri A.Rab, learned Additional Government Advocate.

Coram: Hon'ble Irshad Hussain, J.
Hon'ble Rajesh Tandon, J.

Dated: June 6, 2005.

(Per: Hon'ble Irshad Hussain, J.)

Appellant Akhlaque Ahmad stand convicted and sentenced to undergo imprisonment for life under Section 302 I.P.C., per judgment dated 14-11-1991, passed by the then Session Judge, Dehradun in Sessions trial No. 8 of 1990 for having committed the murder of his wife Smt. Zubaida in between the night of 27/28 July, 1989 in his quarter No. D-181, Bairaj Colony, Rishikesh.

2- The prosecution case briefly stated is that the appellant, employed as chaukidar in Irrigation Department, was residing in the above mentioned quarter with his wife and children. In the morning of 28-7-1989 Chandra Pal, a mate in the Irrigation Department gave information to Girish Kumar Sharma (P.W.1) Junior Engineer Incharge of the department, that Smt. Zubaida wife of Akhlaque Ahmad had been found murdered in her quarter. Smt. Zubaida was found lying dead in a pool of blood on a cot with injury on the left side of the neck. Girish Kumar Sharma prepared written report, Ext. ka.1 and delivered it at the police station, on the basis of which check F.I.R. Ext. Ka.17 was prepared. None was nominated as the assailant or culprit in the F.I.R. The investigation was taken up by S.I. Hazari Prasad (P.W.7), who left for the scene of the incident and held inquest on the dad body of Smt. Zubaida. He attached blood-soaked clothes and bed spreads vide memo, Ext.

Ka.3 and also attached blood-stained and plain earth from the floor of the room. He then packed and sealed the dead body and sent it for post mortem with inquest report, Ext. Ka.2 and other related documents. He also prepared site-plan, Ext. Ka.15, of the place of the incident.

3- The post mortem of the dead body of Smt. Zubaida was performed by Dr. Man Singh (P.W.6) at 2.30 P.M. on 29-7-1989 and post mortem report, ext. Ka-8 was then prepared. The following ante-mortem injury was detected on the person of the deceased:

> 'Incised wound 2cm x 1cm on the right side of neck, 4 cm below the right ear, extended up to back side of the neck. The carotid 9internal and external0 vessels of the right side were cut and trachea was cut at the level of lower thyroid right side.'

The death of the deceased occurred due to shock and haemorrhage as a result of the ante-mortem injury.

4- On 10-8-1989 the investigation of the case was entrusted to Inspector J.P. Sharma (P.W.8) and on that day he is alleged to have requisitioned sealed bundle of the blood-stained clothes and after opening the bundle re-examined the blood-stained clothes in the presence of the appellant, who failed to give any satisfactory explanation about the blood-stains on his shirt and Paijama which were attached on 28-7-1989 by the first Investigating Office and were packed and sealed with other blood soaked clothes and items.

5- It is also the case of the prosecution that on 21-9-1989 at about 1.30 P.M. appellant appeared at the police station before Inspector J.P. Sharma while witness Chandra Mohan Virmani (P.W.4) and Pradeep Sharma were also present at the police station. The appellant made extra-judicial confession of his guilt and admitted that he had murdered his wife Smt. Zubaida while she was in her sleep by giving a Gandasa blow on the neck on that ill-fated night. The appellant also gave information of concealment of the Gandasa which he volunteered to be discovered at his instance and in pursuance thereof the same was got recovered on that day in the presence of the said Investigating Office, other police officials

and witnesses Mam Chand(P.W.5), Mahesh and others from the Chhapar of the enclosure in the back of the quarter. The same was found to be blood-stained. The memo of discovery of Gandasa, Ext. Ka.7 was then prepared. The blood stained clothes and the Gandasa were sent for chemical analysis and per report, Ext. Ka.21, the Gandasa (Ext. III) was found to be stained with human blood. The report, Ext. ka.22 relates to the clothes of the deceased and the accused and the bed spreads. On completion of the investigation, charge sheet, Ext. ka. 19, was submitted against the appellant on 17.12.1989.

6- The appellant pleaded not guilty and besides denying the accusations contended that he has been falsely implicated in the case when the local police failed to trace out the real culprit. He claimed to have told the police that one Jaipal who bear grudge against him, should be interrogated, but no heed was paid to his request. No evidence in defence was adduced.

7- At the prosecution, to bring home guilt to the appellant, examined eight witnesses. P.W. 1, Girish Kumar Sharma is the informant of the case. P.W.2, Akbar, son of the appellant was examined as eye witness as he was in the house in which the offence was committed. He was less than four years old on the day of the occurrence. He gave out that his mother was assaulted by Gandasa by thieves and not by his father. P.W.3, Dinesh Chandra is the witness before whom the sealed bundle of blood-stained clothes was opened on 10-9-1989 vide memo, Ext. Ka.5, and at that time according to him the appellant failed to give any explanation about the presence of blood-stains on his shirt and Paijama. P.W.4, Chandra Mohan Virmani is the witness of alleged Extra-Judicial confession of the appellant. P.W.5, Mam Chand is a witness of recovery of Gandasa (Ext. III) at the instance of the appellant. P.W.6, Mr. man Singh, as stated above, conducted autopsy on the dead body of the deceased. P.w.7, S.I. Hazari Prasad and P.W.8, Inspector J.P. Sharma, the tow Investigating Officers of the case gave evidence to prove the steps taken in the course of the

investigation and the documents including the charge sheet, Ext. Ka. 19 submitted against the appellant on 17-12-1989.

8- Learned Session Judge on an appraisal of the evidence, came to the conclusion that the following circumstances stand proved beyond reasonable doubt, and the chain of the circumstances lead to the inference that the murder of Smt. Zubaida had been committed by her husband, the appellant:

(1) That the appellant and his deceased wife were living together with their children and the appellant has not been able to explain as to how and who committed the murder of his wife.

(2) That the appellant himself did not report the matter to the police and did not lodge report of the incident in the first instance.

(3) That blood-stains of human origin of group-A were detected on the appellant's Paijma and shirt which were attached by the Investigating Officer from his quarter and that the same group of blood was found on the clothes and bed spreads of the deceased.

(4) That the appellant failed to put forward any satisfactory explanation as under what circumstances his Paijama and shirt got blood-stains.

(5) That blood-stained Gandasa, Ext. III, was recovered at the instance of the appellant.

(6) That the appellant made an admission contained in Ext. Ka. 6 and the admission determined how and by whom and under what circumstances the murder of the deceased was committed and that the statement of the appellant denying the correctness of the statements of certain prosecution witnesses was Incorrect and false.

9- Learned Senior Advocate appearing on behalf of the appellant persuasively urged that the evidence of child witness had been illegally ignored and that the inferences in regard to the alleged circumstances drawn by the learned Session Judge are based on conjectures by ignoring the admitted facts such as that during the night of the incident and appellant was out of his

residential quarter to perform night duty as chaukidar and in a situation like this no plausible explanation could have been given by him in regard to the manner of the commission of the crime. He also argued that mere non lodging of the F.I.R. by t he appellant could not be an incriminating factor to connect him with the crime, there was no reliable evidence to prove that the Paijama and shirt of the appellant were properly attached, the discovery of the Gandasa, the alleged weapon of assault was not at the instance of the appellant and that no part of the alleged confession could have been taken in to reckoning against the appellant. Therefore, the learned counsel urged that the charge against the appellant has not been established by the evidence of the prosecution. On the other hand the learned A.G.A. supported the judgment of the Session Judge by submitting that the circumstances proved by acceptable evidence against the appellant taken together complete the chain as to point only to the guilt of the appellant and are not capable of any explanation which is not consistent with the hypotheses of the guilt of the appellant. He therefore argued that the appeal being devoid of merit deserves to be dismissed.

10- It is the admitted case of the prosecution that in the night of the occurrence Akbar (P.W.2) a child of less than four years at the relevant time was with the deceased in the house and his statement was also recorded by the Investigating Officer., On perusal of the statement of the child witness Akbar, learned Sessions Judge opined that his evidence does not make any sense and that his statement is neither here nor there. It was thus observed that the direct evidence relied upon by the prosecution is of no help and consequence. The evidence of this child witness need to be reproduced verbatim, which is as below:-

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11- The evidence of the child eye-witness does not appear to be entirely incoherent, inconsistent and tutored. Therefore, in our view even if it can not be taken to support the allegation of the prosecution, the same had the effect of casting real suspicion and doubt on the claim of the prosecution about involvement of appellant in the commission of the crime.

12- Before taking up the various circumstances stated to have been established satisfactorily by the evidence of the prosecution it need to be stated that the learned Sessions Judge has rightly not placed reliance on the so called extra-judicial confession, Ext. Ka.6, said to have been made by the appellant o n 21-9-1989 at the police station as it is hit by the provision of Section 25 of the Evidence Act. This brings us to the first circumstance out of the six and which pertain to absence of any explanation by the appellant as to how and who committed the murder of his wife in his residential quarter. It was the case of the prosecution that the appellant was employed as chaukidar in Irrigation Department and according to the evidence of the prosecution adduced through Girish Kumar Sharma (P.W.1), the Junior Engineer of the Department, appellant was in the night of 27/28-7-1989, on night duty from 10 P.M. to

6 A.M. Appellant in his statement under Section 313 of the Code

of Criminal Procedure denied to the accusation of the prosecution that the murder of the wife was committed by him in his residential quarter. Learned Senior Advocate appearing for the appellant submitted that when the prosecution itself has come out with a positive case that the appellant performed his chaukidar duty from 10 P.M. to 6 A.M. on the ill-fated night of the incident, the learned Sessions Judge was not justified in observing that no explanation by the appellant has been given as to how the murder of his wife was committed. Learned counsel cited a reported decision in the matter of Nissar Ahmad and another versus State of Bihar; 2001 (42) A.C. C. at 46 in support of his submission. The decision relate to a criminal appeal in a murder case based on circumstantial evidence. One of the important circumstance alleged in that case was that the appellant was present in the house where the deceased died as a result of burn injuries at the crucial time. Despite this, the prosecution in that case came out with a case through P.W.3 that the appellant left the house and went towards the west side along with one year old child of the deceased at 10 A.M. One of the witness in that case claimed that deceased died at about 11 A.M. As per the statement of P.W. 3, the appellant was not present in the house at the crucial time because the prosecution has led no evidence to show that the appellant returned to the house or that at the crucial time, he was present in the house. Consequently it was observed that the courts below fell in error in holding that the plea of alibi, which has been submitted by the prosecution evidence itself, was false and that circumstance No. 7 by itself establish the prosecution case. As stated above, in the instant case the prosecution evidence is to the effect that the appellant was on night duty as chaukidar in the night of the incident and there is nothing to suggest that he skipped his night duty for some time and returned to his house in that night and was with the deceased when she was doe not death. In a situation like this the submission of the learned counsel that absence of any material on record to show and suggest that on the fateful night the deceased was lastly seen alive with the

appellant in his quarter the absence of any explanation about the

manner of death of his wife was not a vital circumstance against him, can not be said to be without substance and force.

13- The second circumstance relate to the appellant himself not reported the matter to the police. Learned counsel for the appellant submitted that in the morning news of murder of the wife of the appellant was spared all around the locality where the quarter of the appellant and other employees of the department were situate and if the report to the police was given be the Junior Engineer Sri Girish Kumar Sharma (P.W.1) of the department, it would not indicate that the conduct of the appellant speaks volumes against hi. Considering the facts and circumstances of the case we see merit in the argument because to initiate the police investigation it was not incumbent on the appellant to himself lodge the report at the police station. It is also of significance that there is nothing to indicate that when the murder came into light the appellant went missing and was not available at his residential quarter. The conduct of appellant therefore can also be taken to dispute the prosperity of the view taken by the learned Session Judge that not reporting of the matter of the police by the appellant made out an incriminating circumstance against him in relation to the crime.

14. The third circumstance pertain to detection of blood-stains of human origin of group-A on the appellant's Paijama which was attached from his quarter and the same group of blood was found on the bed spread and mattress of the deceased. At the outset it need to be stated that blood-stains of this group were not found on the shirt of the appellant and the clothes of the deceased per expert's report, Ext. Ka.22. Blood-stained Paijama and shirt of the appellant were allegedly attached by the first Investigating Officer S.I. Hazari Prasad (P.W.7) on 28-7-1989 vide memo, Ext. Ka.3. According to him these two items were taken from beneath the bed sheet of the appellant's cot in the residential quarter and these were wrapped and sealed along-with blood-soaked bed spreads, mattress and frock of an infant girl who was sleeping with the deceased. The appellant came out with a definite assertion that the I.O. after taking his clean

clothes from his box wrapped and sealed these with other blood-soaked items in the same packet. P.W.7 did not dispute the manner of making one packet of these items. He however denied to the suggestion that the Paijama and shirt of the appellant were not blood-stained and these got blood-stained on being wrapped with other blood-soaked items attached from the room. As pointed out it is of significance that Girish Kumar Sharma (P.W.1) has, who is one of the witness of the memo of the attachment of the clothes and other items, not stated that the Paijama and shirt of the appellant were at that time found blood-stained. He merely gave out that the boold-stained items belonging to the deceased were attached in his presence by the police and the memo of the same was then prepared. Learned counsel also submitted that it is not a case of mere omission but in fact the independent witness did not have the courage to depose falsely to claim that Paijama and shirt of the appellant when seized were blood-stained.

15- Learned counsel submitted that it was highly unusual to seize the Paijama and shirt of the appellant and to wrap these with the blood-soaked bed spread and matters of the deceased. Learned counsel accordingly urged that the abnormal procedure was adopted in all probability to utilize the clothes of the appellant as piece of incriminating evidence in a contingency to maintain the image of the police in case the blind murder committed in the dead hour of the night is not solved or no clue to it is available. Learned counsel also drew attention to the claim of the prosecution that the second Investigating officer Sri J.P. Sharma (P.W.8) proceeded in more unusual manner when the sealed packet of the attached clothes etc was reopened after 42 days on 10-9-1989 on the pretext that it was thought proper to affirm as to whether the Paijama and shirt fits in to the person of the appellant and these actually belong to hi. Investigating Officer gave out that at that time memo, Ext. Ka.5 was also prepared. The appellant in his statement under Section 313 Code of Criminal Procedure very fairly urged that Paijama and shirt were found blood-stained when packet was opened and that he had then told the Investigating Officer that these were not stained with blood when these were wrapped and

sealed with blood-soaked items. No kink evidence was adduced to

prove that the packet of the clothes brought from the Malkhana was duly sealed and there was no tampering with the seal of the packet while it remained in the Malkhana from 28-7-1989 till 10-9-1989. It is of significance that according to Investigating Officer the appellant told him that his Paijama and shirt got wet in the rain on the day of the incident and the same were thereafter removed and kept on a box in the quarter. Memo, Ext. Ka.5 contain a narration that according to the appellant these two clothes were put on the top of a box placed at a distance of about 3 feet from the cot, of the deceased. The manner of keeping these clothes on top of the box is contrary to the claim of the first Investigating Officer that these two items Paijama and shirt were found below the bed sheet of the appellants' cot. The first Investigating Officer has not claimed that these two items were found wet at the time of the seizure. In fact all these aspects create suspicion in the manner as to how these two items were seized, wrapped and sealed with the blood-soaked bed spread and mattress of the deceased and the packet was again opened after 42 days when practically these clothes were not expected to provide clue to the manner of the commission of the crime. In the face of these facts and attending circumstances it appear highly doubtful that Paijama and shirt of the appellant when attached were blood stained. Here it shall not be out of place to mention that strangely enough despite the alleged affirmation on 10-9-1989 that the Paijama and shirt belong to the appellant, even then he was not taken in to custody to connect him with the crime. At any rate the circumstances pertaining to the alleged seizure of the Paijama and shirt of the appellant create suspicion and doubt in the veracity of the prosecution version in this regard and therefore the submission of the learned counsel for the appellant that the learned Session Judge was not fully justified in coming to the conclusion that presence of blood-stains of human origin of group-A on the clothes of the appellant is a concrete incriminating circumstance against the appellant and it make out a link in the chain of the circumstances against hi, can not be said to be without substance.

16- The fourth circumstance that the appellant failed to put forward any satisfactory explanation, as under what circumstance his Paijama and shirt got blood-stained, require no further discussion in view of the above scrutiny of the facts and circumstances of the case and specific assertion made by the appellant this his Paijama and Shirt were not blood-stained and these were taken from his box by the Investigating Officer and were wrapped and packed along with the blood-soaked bed spread and mattress of the deceased as a result of which these also got blood-stained and were so found when the packet was opened again by the Investigating Officer.

17- The next circumstance pertain to the claim of the prosecution that blood-stained Gandasa, Ext-3 was recovered at the instance of the appellant. The recovery is said to be under Section 27 of the Indian Evidence Act. Under Section 27 of the Evidence Act only that portion of the information which distinctly relates to the fact really thereby discovered is admissible. In other words mere statement that the accused led the police and the witnesses to the place from where the concealed article is produced, is not indicative of the information given. There should be evidence to prove that the accused was the author of the concealment and mere concealment of the article of weapon will be of no consequence. The Apex Court in the case of Bodh Raj alias Bodha and others versus State of Jammu and Kashmir; A.I.R. 2002 Supreme Court 3164 reiterated that it is necessary for the benefit of both the accused and prosecution that information given should be recorded and proved and if not so recorded the exact information must be proved through the evidence. Learned counsel for the appellant argued that the legal requirement does not stand satisfied by the evidence of the prosecution because neither it has been proved that the appellant gave information that he is the author of the concealment of the weapon of assault, Gandasa, nor there is any evidence at all, either documentary or oral, to prove that such an information was given by the appellant. To bring home his point of view he drew attention to memo of recovery dated 21-9-1989, Ext.

Ka.7 wherein it is merely mentioned that the appellant led the police personnel and the public witnesses to a 'thatch' situate in the back or rear of his quarter and produced a Gandasa. It does not contain the narration that accused gave information that he is the author of the concealment of the Gandasa. As regards the oral evidence public witness Mam Chand (P.W.5) merely stated that in his presence appellant Akhlaque took out a Gandasa from his thatch which was attached by the Sub-Inspector and memo was prepared. The witness said nothing about the information by the appellant that the Gandasa was concealed by him in the thatch. The Investigating Officer S.I. J.P. Sharma (P.W.8) also merely stated that the appellant in the presence of the public witnesses took out a Gandasa from the 'thatch' situate in the rear of the quarter and gave it to him and the same was sealed in a packet at the spot. Thus, the Investigating Officer has also not claimed that the appellant gave information that he had concealed the Gandasa in the 'thatch' and therefore, the recovery of the said article can not be said to be at the instance of the appellant as contemplated under Section 27 of the Evidence Act.

18- This aspect of the matter may also be considered by another angle. According to the prosecution and the evidence adduced the Gandasa was produced from the 'thatch' situate in the rear or in the back of the residential quarter of the appellant. Ext. Ka.18 is the site-plan of the 'thatch' from where the recovery was allegedly effected and the 'thatch' is shown in the back or rear of the quarter. The evidence of public witness Mam Chand (P.W.5) however reveal that the 'thatch' was situate in the west or by the side of the quarter whereas a tin shed was situate in the west or rear (south) of the quarter of the appellant. This factual aspect of the spot run counter to the claim of the prosecution. Not only this another witness Dinesh Chandra (P.W.3) whose quarter is in the vicinity gave out that the tin shed was situate in the south or back of the quarter of the appellant whereas the 'thatch' was situate on the west or by the side of the quarter and that there never existed any 'thatch' in the south or in the back of the quarter of the appellant. The evidence thus create suspicion about the existence of any

‘thatch’ in the south or back of the quarter of the appellant and

therefore the claim of the prosecution that the appellant got recovered Gandasa from there, appear highly doubtful.

19- The alleged recovery of the Gandasa after about 53 days further raise grave doubt in the claim of the prosecution. Till 21-9-1989 the Investigating Officer has had no reason on the basis of the investigation so far conducted to arrest the appellant and since the recovery of the Gandasa was to be shown the arrest was effected on the basis that the appellant himself came to the police station on that day to make clean him breast and to make a confession about the manner in which he committed murder of his wife and this is how the alleged extra-judicial confession referred above was recorded. There is absolutely nothing to indicate as to what put the appellant to such a frame of mind to come clean and tell himself about the incident and confess his guilt before the police. Since we find nothing of this sort from the material on record, we find force in the argument of the learned counsel for the appellant that on a got up story alleged extra-judicial confession was fabricated to make out a cause for the arrest of the appellant so that the recovery of the Gandasa at the instance of the appellant as contemplated by Section 27 of Evidence Act maybe shown. It shall not be out of place to mention that the prosecution even produced a so called independent witness Chandra Mohan (P.W.4) before whom the appellant is alleged to have made the said statement. As was expected in these circumstances and peculiar facts of the case the witness did not support the prosecution claim as he gave out that he had seen the appellant weeping at the police station but had not heard the appellant admitting his guilt. Witness also gave out that S.O. read out a written statement before him and the appellant but the appellant has not admitted the same as correct. The so- called extra-judicial confession, Ext. Ka.6 thus appear to be a fabricated document and in the facts and circumstances of the case we do not find it safe to dispute the statement of the appellant that he had not given any statement on 21-9-1989 at the police station and that he was beaten up an his signatures were obtained on a paper under coercion. Therefore, we also find force in the argument that his

circumstance could not safely been held to be satisfactorily established. Thus no significance could have been attached to the fact that the blood-stains of human origin were reported on the Gandasa (Ext. 3) taking it as such to be the weapon wielded by the appellant in the murder.

20- So far as the last circumstance which according to the learned Session Judge emerge from the extra-judicial confessions is concerned, it is to be stated that when the Ext. Ka.6 clearly appear to be a fabricated document no part of it could have legally been taken as the admission of the appellant referring to the circumstances under which the murder was committed. When the appellant was not having any suspicion in the character and fidelity of his wife the so called admission in regard to the nagging conduct of his neighbor Jaipal towards his wife could not have safely been taken to indicate that the appellant had motive to eliminate his wife to maintain the honor and reputation of his family. Even other-wise when the learned Session Judge came to the conclusion that the extra-judicial confession was hit by the provision of Section 25 of the Indian Evidence Act not only the alleged confession in regard to the offence even alleged admission of an incriminating fact contained the statement could not have been utilized in evidence under Section 21 of the Evidence Act. In other words extra-judicial confession could have legally be taken to make out any incriminating circumstance against eh appellant.

21- For the reasons aforesaid we are of the view that it is sufficiently evident that none of the above circumstances stand established satisfactorily and beyond doubt against the appellant and therefore chain of impeccable circumstances having not been formed the appellant should have been given the benefit of doubt. Since the suspicion alone can not take place of proof of guilt, we feel it safe to extend the benefit of doubt to the appellant and accordingly the appellant is held not guilty of the offence with which he stand charged, that is commission of the murder of his wife. The appeal therefore succeed and is to be allowed accordingly.

22- The appeal is allowed. The judgment dated 14.1.1991 is set-aside. The appellant Akhlaque is acquitted of the charge under section 302 I.P.C. He is on bail. He need not surrender. His bail bonds are cancelled and sureties are discharged.

23- Let the record the transmitted to the learned Session Judge concerned for compliance.

(Rajesh Tandon, J.) **(Irshad Hussain, J.)**

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